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Supreme Court of the United States

October Term, 1941

No. 908

NEW YORK AND LONG BRANCH RAILROAD COMPANY
Petitioner

v.

THOMAS M. FURY,
Respondent

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

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Supreme Court of the United States

October Term, 1941

No. .....

NEW YORK AND LONG BRANCH RAILROAD COMPANY,
Petitioner,

v.

THOMAS M. FURY,
Respondent and Appellee Below.

Petition for Writ of Certiorari to Monmouth County Court of Common Pleas, New Jersey, to Review the Judgment of the New Jersey Court of Errors and Appeals

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

On petition filed under the provisions of the New Jersey Workmen's Compensation Act (c. 95, Pamphlet Laws of New Jersey, 1911, as amended; now R. S. N. J. 1937, Title 34, c. 15), the Workmen's Compensation Bureau made an award of compensation on March 25, 1938 to petitioner's employee, Thomas M. Fury (Tr. pp. 179-184).

Fury, who was employed by petitioner as a signal maintainer at and in the area of petitioner's interlocking plant at Matawan Tower, Matawan, New Jersey, was struck and injured after dark on January 29, 1935, while on his way home from work, by the engine of a passenger train operated by and on a track of The Central Railroad Company of New Jersey near its connection with and intersection of petitioner's line at the Tower. The Jersey Central's track at the point at which the accident occurred was held below to be within the "domain" of the performance of Fury's duties as signal maintainer (Tr. pp. 207, 215) there apparently being no separate signal maintenance work by Jersey Central employees within the area of the particular interlocking plant. As finally determined below the accident occurred at such a time and place, and under such circumstances of employment, as to entitle Fury to recover compensation from petitioner under the provisions of said Workmen's Compensation Act allowing such a recovery without proof of the employer's negligence if the injury in question was caused by an accident arising out of and in the course of employment (R. S. N. J. 34:15-7, 8 and 9).

Fury's claim (Tr. p. 1) was challenged in petitioner's answer thereto (Tr. pp. 4, 5) upon the ground, among others, that petitioner was engaged in interstate commerce at the time of the accident and that Fury was likewise so engaged if his injury arose out of and in the course of his employment.

The Workmen's Compensation Bureau concluded that the accident did arise out of and in the course of Fury's employment with petitioner (Tr. p. 181), that neither petitioner nor Fury was engaged in interstate commerce at the time of the accident (Tr. p. 182), and accordingly, that the Federal Employers' Liability Act was inapplicable and that the Bureau had jurisdiction to award compensation under the Workmen's Compensation Act.

On appeal to the Monmouth County Court of Common Pleas the judgment of the Bureau was reversed and the award was set aside (Tr. p. 189) upon the ground that the accident did not arise out of and in the course of the employment (unreported opinion of Judge KNIGHT, Tr. p. 185).

Certiorari was first denied by a single justice of the New Jersey Supreme Court (Tr. p. 191) but subsequently granted by the court *en banc* (Tr. p. 199). Upon consideration of the merits, that court reversed the Pleas and affirmed the judgment of the Bureau (Tr. p. 209; opinion by Mr. Justice HEHER, Tr. pp. 203-209). The decision was that Fury "remained within the ambit of service" and was within his "domain of inspection" at the time of the accident.

The Court of Errors and Appeals, on October 29, 1941, affirmed the judgment of the New Jersey Supreme Court (Tr. p. 216; opinion by Mr. Justice PERSKIE, Tr. pp. 213-215). That court conceded that petitioner, at the time of the accident,—

> "was engaged in interstate transportation, or work so clearly related to it as to form a part of it" (Tr. foot of p. 214)

and further conceded that Fury,—

> "when actually at his work at the time of his injury may also be said to be included within the stated category of appellant (petitioner here)". (Tr. top of p. 215)

in other words, in the "category" of interstate commerce. The court nevertheless concluded that the case was not one "of *exclusive** jurisdiction under the Federal Employers' Liability Act", finding the undisputed proofs to be "that, at the moment of injury, respondent (Fury) was merely walking home from his work" (Tr. p. 215). The court thereupon added:

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* Emphasis supplied.

"The fact that respondent (Fury) was within the ambit of his services, and the fact that he might have become properly engaged in work forming a part of appellant's interstate transportation, did not meet the determinative prerequisite of the fixed test of exclusive jurisdiction within the meaning of the Federal Employers' Liability Act, supra, namely, that respondent (Fury) was, at the moment of injury *actually* engaged in work which in fact formed a part of the interstate transportation in which appellant was engaged.

"The Bureau did have jurisdiction to entertain and determine respondent's (Fury's) claim petition for compensation and its judgment is free from Federal and State constitutional infirmities" (Tr. foot p. 215).

II

Jurisdiction

Jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended February 13, 1925, c. 229, 43 Stat. 937 (28 United States Code, sec. 344 (b)). Specifically, petitioner asserts "immunity" from the operation of the New Jersey Workmen's Compensation Act under and by virtue of the paramount and exclusive provisions of the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65*, (45 United States Code, § 51 *et seq.*).

As already stated, the judgment of the New Jersey Court of Errors and Appeals, sought to be reviewed, was entered on October 29, 1941 (Tr. p. 216). This petition for certiorari is filed on January 28, 1942.

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* The amendment of August 11, 1939, c. 685, 53 Stat. 1404, was enacted subsequent to the accident involved in the case at bar.

III

Question Presented

The question involved is whether an employee of an interstate railroad carrier, employed as a signal maintainer to inspect, repair and maintain signal equipment, crossing signals, roadside train signals and switches at the carrier's interlocking plant controlling both interstate and intrastate commerce, who was injured while on his way home at the end of his day's work but while still within the ambit or domain of his employment, may recover compensation under a state law, or whether the Federal Employers' Liability Act is exclusively applicable.

IV

Reasons Relied on for the Allowance of the Writ

A. The decision of the New Jersey Court of Errors and Appeals as to the jurisdiction of the Workmen's Compensation Bureau of that state is in conflict with the decisions of this Court on the same matter in such cases as *Erie Railroad Company* v. *Winfield* (1916), 244 U. S. 170.

B. Assuming, without conceding, that *Erie Railroad Company* v. *Winfield, supra,* does not control the case at bar, then said New Jersey Court of Errors and Appeals has decided a federal question of substance not heretofore determined by this Court.

C. It is important to railroads engaged in interstate commerce (and subject as such to the jurisdiction of the Interstate Commerce Commission to which they report) and to the employees thereof, as well as of some public importance, to know whether an employee engaged in interstate activities and admittedly subject to the Federal

Employers' Liability Act during working hours steps out of that jurisdiction and into state jurisdiction merely by starting home at the end of the day.

WHEREFORE, petitioner prays that a Writ of Certiorari issued under the seal of this Court to review the judgment of the New Jersey Court of Errors and Appeals be directed to the Monmouth County Court of Common Pleas of the State of New Jersey, to which court the record in this case has been remitted, commanding said court to certify and send to this Court a full and complete transcript of the record of the proceedings in the cause entitled Thomas M. Fury, Petitioner-Respondent, *vs.* New York and Long Branch Railroad Company, Respondent-Appellant, to the end that the cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said New Jersey Court of Errors and Appeals, dated October 29, 1941, affirming the judgment of the New Jersey Supreme Court, entered on December 24, 1940, be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated: January 28, 1942.

HOWARD L. KERN,
WILLIAM F. HANLON,
Counsel for Petitioner,
New York and Long Branch Railroad Company.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The opinion of the New Jersey Court of Errors and Appeals (Tr. pp. 213-215) is reported in 127 N. J. L. 354 and 22 Atl. Rep. (2d) 286. The opinion of the New Jersey Supreme Court (Tr. pp. 203-209) is reported in 126 N. J. L. 25 and 16 Atl. Rep. (2d) 544.

II

Jurisdiction

The date of the judgment to be reviewed and the statutory provision which is believed to sustain the jurisdiction of this Court have been stated in the preceding petition, which is hereby adopted as a part of this brief.

III

Statement of the Case

The case has been partially stated in the preceding petition under I. We here expand the salient facts.

Petitioner, New York and Long Branch Railroad Company, operates and is the owner of a two-track railroad extending from a junction with the railroad of The Central Railroad Company of New Jersey at the north end of the bridge across Raritan Bay between Perth Amboy and South Amboy to a junction with The Pennsylvania Railroad Company at Bayhead, over which connecting line travel interstate passengers and freight (Tr. pp. 75-79 and

81, and Exhibits R-6, R-1 and R-4). Over said connecting line of petitioner interstate and intrastate trains of the Pennsylvania and of the Jersey Central, both passenger and freight, are operated under a tripartite agreement dated January 31, 1930 (Ex. R-6, Tr. pp. 128-177).* Petitioner has its own superintendent in charge of the operation and maintenance of petitioner's property, line, facilities and appurtenances (Article Four, Sec. 1 of Tripartite Agreement, Tr. p. 137). Petitioner also has its own ticket and freight agents who are appointed by its superintendent (Tr. p. 138). It sells through passenger tickets to points outside of New Jersey as well as to points within the State (Tr. p. 93). Most of the passenger trains operated over petitioner's line have their eastern or northern terminus either at the Pennsylvania Railroad station in New York City or at the Jersey City passenger terminal of the Jersey Central, where passengers transfer to or from ferries connecting with the Jersey Central's ferry terminus† at Liberty Street, New York City (Tr. pp. 61, 62, 92 and 93). Much of the freight passing over petitioner's aforesaid line of railroad originates at or is destined to points outside the State of New Jersey (Tr. pp. 92-93). In addition to the passenger and freight trains of the Pennsylvania and the Jersey Central, to which ref-

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* This agreement is in no sense a lease of petitioner's line to the Pennsylvania and the Jersey Central, as erroneously supposed by the Workmen's Compensation Bureau (Tr. p. 182), but a joint facility arrangement between the three roads. Petitioner reports separately to the Interstate Commerce Commission and its operations are not reported by either the Pennsylvania or the Jersey Central. The Bureau's misconception led it to the false conclusion that petitioner "is not a common carrier" (Tr. *id.*). However, the Court of Errors and Appeals did not share the Bureau's misconception or arrive at an erroneous conclusion in that respect.

† Until very recently, and at the time of the accident in question, the Jersey Central had a second ferry terminus at West 23rd Street, New York City.

erence has been made, petitioner owns and operates two drill engines which switch and move cars, both passenger and freight, which are engaged in interstate movements, including freight cars containing freight in interstate transit (Tr. pp. 93 and 94).

Petitioner's aforesaid line of railroad from the Raritan Bridge to Bayhead crosses a single track branch of the Jersey Central (extending from Freehold in a northeasterly direction to Keyport and East Long Branch) at a point known as the Matawan Tower. (See Ex. R-1, Tr. p. 118.) Petitioner's double track line is connected with said single track line of the Jersey Central, at the Matawan Tower intersection of said lines, by two connecting WYE tracks (*id.*).

The switches and signal equipment operated from the Matawan Tower control the operation of the aforesaid passenger and freight trains at the aforesaid crossing and connecting point. Fury, on January 29, 1935, the date of his injuries, was one of the employees of petitioner whose duties were to inspect, repair and maintain the signal apparatus and equipment in use at and around and operated from or connected with the Matawan Tower, and Fury's "domain of inspection embraced the Central Company's right of way from the intersection to and beyond the point of the mishap, for in that space were located signals and switches constituting a part of the interlocking signal plant essential to the switching of trains from one said road to the other at the Junction" (Tr. p. 207).

On and before January 29, 1935 Fury's regular hours were from 8 a. m. to 5 p. m. (Tr. p. 8). On the date mentioned he worked for about an hour of overtime repairing equipment in a substation which formed a part of the Matawan interlocking plant (Tr. pp. 10-83). At or shortly after 6 p. m., having completed the repair work, he started to walk home by the shortest available route which happened to be along the single track line of the

Jersey Central running in a northeasterly direction toward East Long Branch (Tr. p. 13). It was bitterly cold and there was about a foot of snow on the ground (Tr. p. 13). The only cleared path lay between the rails (Tr. p. 13). Fury followed this path, protecting his ears by ear-muffs or ear-tabs (Tr. p. 31). After he had walked a few hundred feet, but before arriving at the point at which he intended to leave the track to go to his nearby home, he was struck from behind and injured by the locomotive of a Jersey Central passenger train, of the approach of which he became aware too late to escape injury (Tr. pp. 18 and 102).

The two higher courts, as well as the Workmen's Compensation Bureau of New Jersey, concluded that Fury was not a trespasser and had not departed from the "ambit" or "domain" of his employment with petitioner when he was struck.

IV

ARGUMENT

POINT A

From the very nature of the employee's duties to inspect and maintain signal equipment used in connection with interstate commerce by rail the employee was engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

We need do little more than to cite the controlling decisions of this Court:

Erie R. R. Co. v. *Winfield* (1917), 244 U. S. 170;
New York Central R. R. Co. v. *Winfield* (1917), 244 U. S. 147;
New York Central R. R. Co. v. *Porter* (1919), 249 U. S. 168;

Chesapeake & Ohio Ry. Co. v. *Stapleton* (1929), 279 U. S. 587;
New York Central R. R. Co. v. *Marcone* (1930), 281 U. S. 345.

In *New York Central R. R. Co.* v. *Winfield, supra,* the employee was a section laborer assisting in the repair of the carrier's main track and while tamping cross-ties struck a pebble which chanced to rebound and hit his eye. In *New York Central R. R. Co.* v. *Porter, supra,* the employee was a section-man who was struck and killed by the carrier's engine while engaged in shoveling snow along the track. It should be observed that the duties of the employee at bar required him to keep the switches "free of snow and ice" (Tr. p. 207). In *Chesapeake & Ohio Ry. Co.* v. *Stapleton, supra,* the employee was a section hand engaged at the time he was run over in bringing water for his companions. In *New York Central R. R. Co.* v. *Marcone, supra,* the employee's duty was to fill journal boxes of engines in a roundhouse for inspection. In *Erie R. R. Co.* v. *Winfield, supra,* the employee had been in charge of a switch engine in the carrier's freight yard at Croxton, N. J.

POINT B

It is entirely immaterial that the employee in the case at bar had started home and was not manually engaged upon his duties at the time of his injury.

This Court so ruled in *Erie R. R. Co.* v. *Winfield, supra,* wherein the employee had placed his switch engine for the night and had started to leave Croxton Yard. His route lay across some of the tracks and while passing over one he was struck by an engine and received injuries from which he soon died.

In *New York Central R. R. Co.* v. *Marcone, supra,* it was contended that the deceased employee, having finished his work, was no longer employed in interstate commerce. Mr. Justice STONE, now Chief Justice, adverted to the fact that there was some evidence to support a finding that the employee had not finished his work and added:

> "But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to entitle him to the benefit of the Employers' Liability Act." (Citing *Erie R. Co.* v. *Winfield, supra,* and other cases.)

See, also, *North Carolina R. R. Co.* v. *Zachary* (1914), 232 U. S. 248, in which it appeared that the employee, a locomotive fireman, at the time of the accident, was temporarily absent from his engine for a purpose not inconsistent with his duties and that the engine had not yet been coupled to the interstate cars which it was to move.

Clearly, then, the New Jersey Court of Errors and Appeals fell into error when it reasoned as follows:

> "Here the proofs are undisputed that, at the moment of injury, respondent was merely walking home from his work. The fact that the respondent was within the ambit of his services, and the fact that he might have become properly engaged in work forming a part of appellant's interstate transportation, do not meet the determinative prerequisite of the fixed test of exclusive jurisdiction within the meaning of the Federal Employers' Liability Act, *supra,* namely, that respondent was, at the moment of injury, *actually* engaged in work which in fact formed a part of the interstate transportation in which appellant was engaged."

POINT C

The Federal Employers' Liability Act is dominant and exclusive and supersedes the New Jersey Workmen's Compensation Act in all cases to which the former statute is applicable.

We need only refer to the cases already cited and to *Lindgren* v. *United States* (1930), 281 U. S. 38, in which the principle was applied to the Merchant Marine Act (which, in turn, incorporates the Federal Employers' Liability Act by reference). See also *New Orleans & Northeastern R. R. Co.* v. *Harris* (1918), 247 U. S. 367.

POINT D

The error of the court below resulted from its emphasis upon the employee's manual inactivity "at the moment of injury" instead of upon the nature of the duties usually performed by him and in which he had been engaged on the day of the accident.

The highest court below failed to cite in its opinion any of the cases cited above. Instead it cited *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.* (1916), 239 U. S. 556; *Illinois Central R. R. Co.* v. *Behrens* (1914), 233 U. S. 473, and *Erie R. Co.* v. *Welsh* (1916), 242 U. S. 303. In the first of these cases the employee "on the day of the injury" was engaged in taking down and putting into a new location an overhead counter-shaft,—a heavy shop fixture through which power was communicated to machinery in a repair shop. In the second case it was held that the requisite employment in interstate commerce did not exist where a member of a switching crew, at the time of his fatal injury, was engaged in an intrastate movement of several cars all loaded with intrastate freight. In the

third case, the employee was a yard conductor who was reporting to the yard master's office for further orders at the time of his injury, which orders might have involved either intrastate or interstate duties.

It is submitted that the cases cited below are inapposite, and that the later cases upon which we rely are controlling.

The court below fell into error in stating the "test" to be "whether the instrument of service at the moment of the injury and the work that the employee was doing at the moment of the injury, were actually a part of the interstate transportation in which the carrier was engaged." The reference in the opinion to "the instrument of service" is inapposite and confusing. The court seems to have had in mind such cases as *Industrial Accident Commission* v. *Davis* (1922), 259 U. S. 182, in which the employee was injured while engaged in repairing a locomotive which had been dismantled for heavy repairs. The test is not whether the "instrument of service" which causes the injury (such as an engine, a piece of machinery, or a tool) is engaged as an instrumentality of interstate commerce at the time of the injury, but whether the employing railroad and the employee injured are so engaged (cases cited including *Shanks* v. *Delaware, Lackawanna & Western R. R. Co., supra; cf. Boston & Maine R. Co.* v. *Armburg* (1932), 285 U. S. 234).

Apparently referring to the rule applied in *Industrial Accident Commission* v. *Davis, supra,* but without citing that case, the court below concluded that:

> "What is true as to the mechanical instrumentality (when withdrawn from interstate transportation) is, in all reason and justice, true as to the human instrumentality, the employee."

The fallacy of the analogy lies in the fact that this Court has held that an employee does not withdraw from inter-

state commerce in which he has been engaged merely because he has finished his day's work and is in the course of departure from the scene thereof. *Erie R. R. Co.* v. *Winfield, supra,* and other cases cited under Point B hereof.

POINT E

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision and judgment of the court below.

Respectfully submitted,

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New York and Long Branch Railroad Company.

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Supreme Court of the United States

OCTOBER TERM, 1941—NO. 908.

NEW YORK AND LONG BRANCH RAILROAD COMPANY,

Petitioner,

vs.

THOMAS M. FURY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1941—NO. 908.

NEW YORK AND LONG BRANCH RAILROAD COMPANY,
Petitioner,

vs.

THOMAS M. FURY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Associate Justices of Said Court:

Your respondent respectfully shows:

I.

Summary Statement of the Matter Involved.

The statement of the matter involved as appears in petitioner's brief is substantially correct save for the fact that it should be noted that while respondent was awarded compensation in the New Jersey Workmen's Compensation Court, on the appeal to the Monmouth County Court of Common Pleas, the judgment was reversed on the ground that respondent was a trespasser and, therefore, not entitled to recover.

The question of whether or not respondent was engaged in interstate commerce was not considered in

the Monmouth County Court of Common Pleas; nor, was this question considered on the appeal to the New Jersey Supreme Court which reversed the Monmouth County Court of Common Pleas. The matter of respondent's being engaged in interstate commerce was considered for the first time during the appeals in the New Jersey Court of Errors & Appeals. Of course, this issue was urged in the New Jersey Workmen's Compensation Court. At this point it is significant to note that all thirteen members of the Court of Errors and Appeals, representing the entire personnel of that Court, qualified to sit in this case, concurred in the opinion announced. There was not a single dissenting vote.

The New Jersey Court of Errors & Appeals held, and we submit rightfully so, as follows:

> "The proofs utterly fail to support the claim that the Bureau (The New Jersey Workmen's Compensation Bureau) was without jurisdiction of the subject matter on the ground that appellant and respondent were engaged in interstate commerce at the time of the accident. Employer's Liability Act, 45 U. S. Cases, 51 *et seq.*—R. P. 214;"

and held further:

> "We are nonetheless satisfied that the proofs completely fail to meet the firmly fixed test of exclusive jurisdiction under the Federal Employer's Liability Act, *supra.*" R. P. 215.

The petitioner, New York and Long Branch Railroad Company, operates and is the owner of a railroad the confines and termini of which are undisputedly

within the State of New Jersey, running from Perth Amboy to Bayhead. Its tracks, roadbed and facilities are leased under an Operating Agreement (R. P. 128, *et seq.*) to the Pennsylvania Railroad Company and the Central Railroad Company of New Jersey; the latter two railroads being definitely engaged in interstate commerce. In short, under this Agreement, the New York and Long Branch Railroad Company, leases its property and services to the Central Railroad Company of New Jersey and the Pennsylvania Railroad Company.

II.

Argument.

POINT A.

The respondent was not engaged in interstate commerce at the time of his injury and therefore the Federal Employer's Liability Act of April 22, 1908, C. 149, 35 Stat. 65 (45 U. S. Code, Sec. 51 *et seq.*) does not apply.

The early case of *Shanks* v. *Delaware Lackawanna & Western Railroad Co.*, 239 U. S. 556, enunciated the doctrine which is applicable in the present case and which has been followed repeatedly by this Court. The facts in that case were that Shanks, an employee of the railroad which was engaged in both interstate and intrastate commerce, was engaged in working in the Company's machine shop, repairing locomotives used in such transportation. He was injured while engaged solely in taking down and putting into a new location an overhead countershaft—a heavy shop fix-

ture—through which power was communicated to some of the machinery used in the repair work. The Court there stated:

> "The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the Act refers to the service being rendered when the injury was suffered * * * Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The Court held that Shanks was engaged in work too remote from interstate transportation to be practically a part of it and, therefore, was not employed in interstate commerce within the meaning of the Employers' Liability Act.

In the case of *Chicago, Burlington & Quincy Railroad Co.* v. *Harrington,* 241 U. S. 176, the employee was a member of a switching crew engaged at the time of his death, in switching coal belonging to the defendant to a coal shed where it was to be placed in bins and supplied as needed to locomotives, some of which were engaged in interstate traffic and others in intrastate traffic. The Court held that the employee was not engaged in interstate transportation in the taking of the coal to the coal chutes and refused to apply the Federal Employers' Liability Act.

In the case of *Bissett* v. *Lehigh Valley Railroad Co.,* 102 N. J. L. 283, affirmed 103 N. J. L. 172, the employee was employed on an engine used only for the

shifting of cars from one place to another in the Company yard, which car was detached from the other cars and taken to a track for repairs; and, while working upon the engine, he fell to the ground and sustained injuries resulting in death. The New Jersey Supreme Court refused to apply the Federal Employers' Liability Act, stating that the employee was not engaged in interstate commerce at the time of the accident. Application for Writ of Certiorari to review this case was made to this Court and denied. *Lehigh Valley Railroad Co.* v. *Bissett,* 273 U. S. 738.

In *Erie Railroad Co.* v. *Welsh,* 242 U. S. 303, the employee was performing miscellaneous services for his employer in the way of breaking and making up trains under orders of the yardmaster, and had to apply frequently to the latter for such orders. The employee, on the night of his accident, had been engaged with a yard crew in taking a freight car loaded with merchandise destined to a point outside the State and a caboose, to one of the yards where the freight car was placed upon a siding. He then returned in the caboose to the yardmaster's office for further orders and was injured while alighting from the caboose. The Court held at p. 307:

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the Act."

In *Lehigh Valley Railroad Co.* v. *Barlow,* 244 U. S. 182, the employee was a member of a switching crew and was assisting in placing three cars containing a

supply of coal for his employer, an interstate carrier, on an unloading trestle within its yards. These cars and their contents had passed over the employer's line from Sayre, Pennsylvania to New York. The cars remained upon sidings and switches and sometime thereafter were removed, at which time the employee was injured. The Court there held:

> "We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce."

An interesting comment by this Court is to be noted in the case of *Industrial Accident Commission of the State of California* v. *Davis,* 259 U. S. 182, p. 287, where it was stated:

> "Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, *at the time* of the injury, must be engaged in interstate *transportation* or in work so closely related to it as to be practically a part of it, in order to displace State jurisdiction and make applicable the Federal Act."

In the case of *Illinois Railroad Co.* v. *Behrens,* 233 U. S. 473, the Court stated:

> "Is the work in question a part of the interstate commerce in which the carrier is engaged? * * *

> Here at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight from one part of the city to another. That was not a service in interstate commerce and so the injury and resulting death, were not within the Statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the Statute, for by its terms, the true test is the nature of the work being done at the time of the injury."

In *Chicago & Northwestern Railroad Co.* v. *Bolle*, 284 U. S. 74, the employee was employed by an employer engaged in interstate and intrastate transportation. The employee was employed to fire a stationary engine used to generate steam to heat the passenger depot, baggage room and other structures used for general railroad purposes. The steam was also used to heat suburban passenger cars while standing in the yards. On the occasion in question, the stationary engine was out of order and employee had been making use of a locomotive engine as a substitute. He was directed to accompany this locomotive engine to a place about four miles distant to obtain a supply of coal. While coal was being taken on one of the locomotives, he was seriously injured. The Court in this case stated:

> "The sole object of the movement of the substitute engine was to procure a supply of coal for the purpose of generating steam. Its movement was in no way related to the contemplated employment of the other three locomotives in interstate transportation. * * *

> There is evidence that respondent at other times had been engaged in supplying other engines with coal and water, firing live engines, and turning a turntable; but his employment at the time of the injury was confined to firing the stationary locomotive for the sole purpose of producing steam. The character of the work which he did at other times therefore, becomes immaterial. * * *
>
> Having in mind the nature and usual course of the business to which the Act relates and the evident purpose of Congress in adopting the Act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion * * * and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

From the principles enunciated in the above cases, it is manifest that respondent, who had finished his day's labors and was on his way home, cannot be held to be employed in interstate commerce at the time of his injury and that being so, his case does not fall within the purview of the Federal Employer's Liability Act.

III.

POINT B.

Petitioner in this case occupies the position of a lessor railroad.

It is conceded that the New York & Long Branch Railroad Company owns the tracks and roadbeds, etc., extending from Perth Amboy to Bayhead, both points within the State of New Jersey.

The Operating Agreement, R. P. 128, is in effect a lease of this property to the Pennsylvania Railroad Co. and the Central Railroad Co. of New Jersey, as a result of which certain reciprocal advantages and obligations inure to all of the parties to it.

In *North Carolina Railroad Co.* v. *Zachary*, 232 U. S. 248, the employee was employed by an interstate carrier namely, the Southern Railway Co. This Company had leased the property of the defendant, an intrastate carrier, whose tracks, etc., were confined solely within the State of North Carolina. The employee was killed as a result of the alleged negligence of the lessor Company. His administrator recovered a judgment in a State Court in North Carolina, which judgment was thereafter affirmed by the State's highest tribunal. An appeal was then taken to the United States Supreme Court, which Court reversed the judgment heretofore obtained on the ground that the lessor Company was deemed to have been engaged in interstate commerce and, therefore, the State Court had no jurisdiction, and that the matter was properly within Federal jurisdiction. However, the significant feature is that this conclusion was

arrived at because of the fact that the local law of the State of North Carolina as laid down in *Logan* v. *North Carolina Railroad Co.*, 116 N. C. 940, 21 S. E. 959, held: that the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employees of the lessee injured through the negligence of the latter.

The writer knows of no local law of the State of New Jersey, which obligates the lessor railroad as in this case, the New York and Long Branch Railroad Company, to respond in damages for the negligent acts of its lessees. Conversely, therefore, the respondent in this case cannot be held to have been employed in interstate commerce.

POINT C.

Conclusion.

It is, therefore, respectfully submitted that the writ of certiorari applied for in this case be denied for the reason that this Court has no jurisdiction to attend the matter before it.

Respectfully submitted,

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